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State Farm Mutual Automobile Insurance Company v. Industrial Commission of Utah Anti-Discrimination Division and Felix Jensen : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Plaintiff/Appellant,

vs.

INDUSTRIAL COMMISSION OF UTAH ANTI-DISCRIMINATION DIVISION and FELIX JENSEN,

Defendants/Appellees.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Plaintiff/Appellant,

vs.

INDUSTRIAL COMMISSION OF UTAH ANTI-DISCRIMINATION DIVISION and BRENDA MENA,

Defendants/Appellees.

Appellate Court No. 940357-CA

Priority No. 15

REPLY BRIEF OF APPELLANT STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

APPEAL OF AN ORDER OF DISMISSAL ENTERED BY
THE THIRD JUDICIAL DISTRICT COURT
THE HONORABLE FRANK G. NOEL PRESIDING

APPEAL OF AN ORDER OF DISMISSAL ENTERED BY
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THE HONORABLE JOHN A. ROKICH PRESIDING

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POINT I.

STATE FARM EXHAUSTED ITS ADMINISTRATIVE REMEDIES.

Appellees argue that State Farm Mutual Automobile Insurance Company ("State Farm") failed to exhaust all administrative remedies available to it and is thereby precluded from seeking trials de novo in the district court. However, State Farm did exhaust all mandatory administrative remedies prior to filing its petitions for review of the final agency actions in the Third Judicial District Court. The fatal flaw in the appellees' argument is their failure to interpret and harmonize the provisions of the Utah Anti-Discrimination Act, § 34-35-1 et seq., the Utah Administrative Procedures Act, Utah Code Ann. § 63-46b-1 et seq., and the Utah Anti-Discrimination Division Administrative Rules, R. 560-1 et seq. The appellees merely focus on a single section or subpart of a particular statute and fail to interpret and harmonize that section or subpart with the entire statutory scheme embodied in the Utah Anti-Discrimination Act, the Utah Administrative Procedures Act, and the Utah Anti-Discrimination Division Administrative Rules.

Utah Code Ann. § 34-35-7.1 sets forth the procedure applicable to a discrimination claim brought under state law. This statute sets forth two distinct procedures. The procedures set forth in Utah Code Ann. § 34-35-7.1(1)-(5) are specifically defined as informal adjudicative proceedings. Utah Anti-

Discrimination Division Administrative Rule, R. 560-1-3(f). After the informal proceedings are concluded, this statute provides that a party may request an evidentiary hearing to review de novo the director's determination and order. It is the position of the appellees that failure to request this evidentiary hearing equates to a failure to exhaust available administrative remedies. This interpretation is not supported by the express language of the statute. Utah Code Ann. § 34-35-7.1(5)(c) specifically provides as follows:

> A party may file a written request to the director for an evidentiary hearing to review de novo the director's determination and order within 30 days of the date of the determination and order. [Emphasis added]

The permissive language contained in this subpart indicates that a party is not required to request an evidentiary hearing, and can allow the order to become a final order and then seek a trial de novo in the district court.

The Anti-Discrimination Act sets forth a statutory scheme which permits an adversely affected party to take two courses of action in respect to seeking further review of the determination and order resulting from the informal adjudicative proceedings. An adversely affected party can request an evidentiary hearing and convert the informal process into a formal adjudicative hearing or the adversely affected party can allow the determination and order to become a final order and seek a trial de novo in the district court pursuant to Utah Code Ann. § 63-46b-15.

Reduced to its basics, State Farm's position is that there is a "fork" in the road which permits the adversely affected party to pursue either of the two courses of action set forth above. It is the position of the appellees that no such fork exists and that an adversely affected party is limited to requesting an evidentiary hearing and converting the informal process into a formal adjudicative hearing. Appellees' argument fails to harmonize the provisions of the Utah Administrative Procedures Act, the Utah Anti-discrimination Act, and the Utah Anti-discrimination Division Rules.

It cannot be disputed that the provisions set forth at Utah Code Ann. § 34-35-7.1(1)-(5) sets forth an informal adjudicative process. Utah Anti-Discrimination Division Administrative Rule, R 560-1-3(f). The Utah Administrative Procedures Act specifically states that final agency action resulting from informal adjudicative proceedings can be appealed to the district court for a trial de novo. Utah Code Ann. § 63-46(b)-15(1)(a) provides in pertinent part as follows:

> The district courts have jurisdiction to review by trial de novo all final agency actions resulting from informal adjudicative proceedings . . .

Thus, because this is a final agency action resulting from an informal adjudication proceeding, State Farm is entitled to seek a trial de novo in the district court. If one accepts appellees' position, one must ignore the clear language of Utah Code Ann. § 63-46b-15.

Appellees rely heavily on High Country Homeowners Ass'n v. Public Service Comm'n of Utah, 779 P.2d 682 (Utah 1989). In that case, the High Country Homeowners Association sought review by the Utah Supreme Court of an order issued by the Public Service Commission. The Division of Public Utilities intervened, and moved for summary disposition on jurisdictional grounds claiming that the Homeowners Association had failed to comply with the provisions of Utah Code Ann. § 57-7-15. That statute provides in pertinent part:

> **Review or Rehearing by Commission -- Application -- Procedure -- Prerequisite to Court Action.**
>
> (1) Before seeking judicial review of the Commissioner's action, any party, stockholder, bond holder, or other person pecuniarily interested in the public utility who is dissatisfied with an order of the commission shall meet the requirements of this section.
>
> (2) (a) After any order or decision has been made by the commission, any party to the action or proceeding, or any stockholder or bond holder or other party pecuniarily interested in the public utility affected may apply for re-hearing of any matters determined in the action or proceeding.
>
> (b) No applicant may urge or rely on any ground not set forth in the application in an appeal to any court. [Emphasis added]

Clearly, the statute at issue in the High Country case is distinguishable from Utah Code Ann. § 34-35-7.1. Utah Code Ann. § 57-7-15 specifically requires by the use of the word "shall" that parties dissatisfied with an order of the commission shall

meet the requirements of this section. This statute indicates that an adversely affected party may apply for re-hearing of any matters determined in the action or proceeding. It is apparently appellees' position that the subsequent use of the word "may" is comparable to the language contained in Utah Code Ann. § 34-35-7.1. However, this interpretation is flawed in that Utah Code Ann. § 57-7-15(1) expressly states that a party "shall" meet the requirements of this section before obtaining judicial review. This type of mandatory language is not present in Utah Code Ann. § 34-35-7.1.

The only Utah case which interprets a statute containing a similar use of the permissive "may" language as opposed to the mandatory "shall" language in respect to seeking further agency review is Heinecke v. Department of Commerce, 810 P.2d 459 (Utah App. 1991). In Heinecke, the Court of Appeals held that the plaintiff did not need to seek review of the division's determination prior to obtaining judicial review. In reaching that result, the Court of Appeals held as follows:

> [N]o provision in the statutes governing the division appears to provide for a review beyond the divisional level as contemplated in § 12(1)(a) of UAPA, which review would in any case be optional so as not to defeat finality for the purposes of judicial review given the "permanent" and "may" usages of the section, nor is any mandatory review provided for as contemplated in Section 12(3).

Heinecke, 810 P.2d at 463. Appellees are apparently taking the position that Heinecke was wrongly decided because the issue concerning exhaustion of administrative remedies was not properly

briefed.[1] However, the Heinecke decision indicates that counsel for the division specifically brought to the Utah Court of Appeals' attention the case of High Country Homeowners v. Public Service Comm'n, 779 P.2d 682 (Utah 1989). This is the primary case relied upon by appellees. The Utah Court of Appeals noted that the High Country court found that Utah Code Ann. § 54-7-15 imposed a jurisdictional prerequisite to judicial review of the PSC's action, and held that "failing to apply for re-hearing within 20 days of the commission's issuance of the order divests [the Supreme Court] of subject matter jurisdiction." Heinecke, 810 P.2d at 462-63; citing High Country Homeowners, 779 P.2d at 684. The Heinecke court noted that the case presently before them was, as is the instant case, subject to no such jurisdictional prerequisite.

In the instant case, Utah Code Ann. § 34-35-7.1(5)(c)-(d) states:

> (c) A party may file a written request to the director for an evidentiary hearing to review de novo the director's determination and order within 30 days of the date of the determination and order.
>
> (d) If the director receives no timely request for a hearing, the determination and order issued by the director requiring the respondent to cease any discriminatory or prohibited employment practice and to provide relief to the

[1]Although the specific issue was not briefed by the parties, the Utah Court of Appeals indicated that it conducted its own independent research concerning this issue. Heinecke, 810 P.2d at 463.

> aggrieved party becomes the final order of the commission. [Emphasis added]

This code section contains the permissive language referred to in the Heinecke case. As the Heinecke court pointed out, where such permissive language is used, the decision by a party not to pursue the "optional" further administrative review does not bar that party from seeking judicial review based on a purported failure to exhaust administrative remedies.

The Utah Anti-Discrimination Act sets forth a unique procedural method for resolving state law anti-discrimination claims. The act specifically sets forth an informal adjudicative process that can result in final agency action if a formal evidentiary is not requested. Utah Code Ann. § 34-35-7.1(1)-(5). These procedures have been specifically defined as an informal adjudicative proceeding. Rule 560-1-3(f). Utah Code Ann. § 63-46b-15 specifically provides that district courts have jurisdiction to review by trial de novo all final agency actions resulting from informal adjudicative proceedings. Clearly, if the legislature had intended that the proceedings set forth in Utah Code Ann. § 34-35-7.1(1)-(5) were some type of process that did not qualify as an informal adjudicative proceeding, then it would have been defined as such. However, the express designation of this section of the statute as an informal adjudicative proceeding renders the review mandated by Utah Code Ann. § 63-46b-15 applicable.

Appellees also claim that State Farm confuses "final agency action" with agency action that subsequently becomes a "final order." However, the appellees admit that the determination and order became a "final agency action" when the time for requesting the further optional administrative review had lapsed. Brief of Appellee, Brenda Mena, p. 16. Clearly, because the further optional appellate review was not requested, the action taken by the agency constituted final agency action. Appellant's argument to the contrary is purely a matter of semantics. It is incongruous to argue that because an additional optional administrative remedy could have been pursued, that there can never be a "final agency action" that would allow State Farm to seek judicial review pursuant to Utah Code Ann. § 63-46b-15.

A. State Farm's Interpretation of Utah Code Ann. § 34-35-7.1 Would Not Cause Possible Inconsistent Results.

Appellees take the position that under State Farm's interpretation of the applicable statutes, contrary and inconsistent results could be attained. It is appellees' position that if both parties were "aggrieved" by the determination and order issued as a result of the informal adjudicative proceedings, that one party could seek an administrative evidentiary hearing on damages and the other party could request a trial de novo in the district court, seeking to have the informal adjudicative order overturned. However, this scenario could not occur based upon the applicable statutory language.

If one party requests an evidentiary hearing to review de novo the director's determination and order pursuant to Utah Code § 34-35-7.1(5)(c), then final agency action would not have occurred which would prohibit a request for a trial de novo in the district court. Final agency action does not exist until 30 days after the determination and order is issued. If any party requests an evidentiary hearing within 30 days after the informal adjudicative procedure has resulted in a determination and order, then the matter would be converted to a formal adjudication.

POINT II.

STATE FARM'S APPEALS WERE TIMELY FILED WITH THE DISTRICT COURTS.

Appellees argue that State Farm's petitions were not timely filed and that State Farm should have filed the petitions within 30 days of the date of issuance. However, appellees' argument fails to take into consideration the specific and unique statutory language contained in Utah Code Ann. § 34-35-7.1. As stated in State Farm's initial brief, Utah Code Ann. § 34-35-7.1(5)(c)-(d) clearly states that an informal adjudicative order becomes final 30 days after it is issued if no timely request for an evidentiary hearing is made. Therefore, because the order was not final until 30 days after issuance, State Farm could not appeal to the district courts until that time period had expired.

Appellees rely on Dusty's, Inc. v. Auditing Div. of Utah State Tax Comm'n, 842 P.2d 868, 870 (Utah 1992). However, this reliance is misplaced. In Dusty's, the Utah Supreme Court held

that the relevant time period is 30 days from the issuance of the order constituting final agency action. However, the "findings of facts, conclusions of law, and final decision" of the Tax Commission in that case provided a specific notice which stated:

> NOTICE: You have thirty (30) days after the date of this order to file in the Supreme Court a petition for judicial review. Utah Code Ann. §§ 63-46b-13(1), 53-46b-14(2)(a).

It is clear that in Dusty's, the "final decision" was a final order on the date of its issuance. However, due to the unique statutory language of the Utah Anti-Discrimination Act, the informal adjudicative procedure did not result in a final order until 30 days after the issuance of the order. It would have been impossible for State Farm to file its petition with the district court within 30 days of the issuance of the order.

CONCLUSION

The district courts erred in their interpretation of Utah Code Ann. § 34-35-7.1 by failing to construe the statute so as to give effect to the Utah Administrative Procedures Act, Utah Code Ann. § 63-46b-1 et seq. The statutory scheme embodied in the Utah Anti-Discrimination Act and the Utah Administrative Procedures Act sets forth two options for a party who is adversely affected by an informal adjudicative decision. The first option is to seek an agency evidentiary hearing and convert the informal adjudication to a formal adjudication. The second option is to allow the informal adjudication to became a final order and then request a trial de novo in the district court.

The district courts erred in concluding that the second option did not exist. The district courts' conclusion ignores the Administrative Procedures Act and focuses solely on the provisions of the Utah Anti-Discrimination Act, failing to harmonize the provisions of those statutory schemes. The judgments of dismissal should be reversed.

DATED this 9 day of March, 1995.

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing Brief of State Farm were mailed, first class postage prepaid, this 10th day of March, 1995, to the following:

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